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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 4

NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS.

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IN THE

Supreme Court of the United States

October Term, 1939

No. 477

NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS.

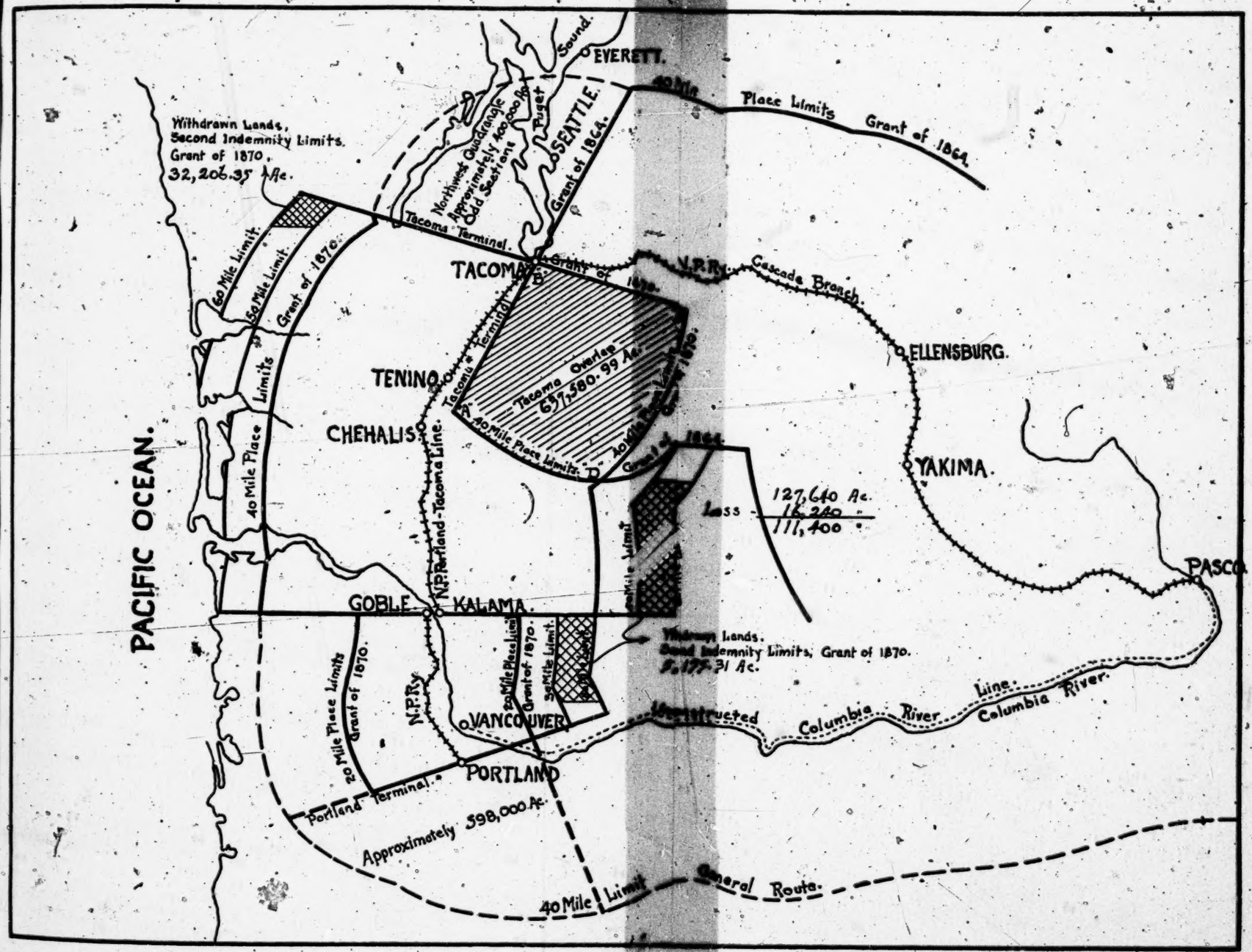
JURISDICTION.

This is a cross-appeal under the special jurisdictional act of May 22, 1936 (49 Stat. 1369) from a decree of the District Court for the Eastern District of Washington, dated June 27, 1939. The appeal was perfected August 21, 1939, within sixty days provided by the act (R. 661).

STATEMENT.

The case is sufficiently stated in the briefs in No. 476. Only such additional facts as are pertinent to this appeal will be here stated.

The railroad and telegraph line authorized by Section 1 of the Act of July 2, 1864 (13 Stat. 365) extends from Ashland, Wisconsin, to Tacoma, Washington. The line from Wallula, Washington, across the Cascade mountains to Tacoma will be referred to as the Cascade Branch. The railroad from a point at or near Portland to Puget Sound, authorized by the Joint Resolution of May 31, 1870 (16 Stat. 378), meets the Cascade Branch at Tacoma, forming a right angle. The forty mile limits of the two grants overlap southwest of Tacoma, forming a rough quadrilateral containing 637,580.99 acres of odd-numbered sections. The situation is shown on the sub-joined sketch (Finding III (e), R. 616).



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This court has decided that the Cascade Branch was constructed and the lands earned under the act of July 2, 1864 (Finding III (f), R. 616). *Northern Pacific v. DeLacey,* 174 U. S. 622. This court has also decided that the line from Portland to Tacoma was constructed and the lands earned under the Joint Resolution of May 31, 1870. *United States v. Northern Pacific,* 152 U. S. 284; *United States v. Northern Pacific,* 193 U. S. 1.

As the 1864 grant was prior, the company earned and received under that grant the odd sections within the overlap. Thus the grant by the Joint Resolution was depleted to the extent of the overlap or conflict of 637,580.99 acres.

On March 1, 1898, by proclamation of the President (29 Stat. 893, 896, 901; 30 Stat. 11, 34); and on December 18, 1902, and August 27, 1906, by orders of the Secretary of the Interior, there were withdrawn and placed in Rainier, Olympic and Columbia National Forests 213,001.66 acres of odd-numbered sections in second indemnity limits of the 1870 grant in Washington. These lands were, on June 5, 1924, within the exterior limits of said forests, and are lands for which appellants are entitled to compensation under the Act of June 25, 1929 if the 1870 grant was deficient on the date of last definite location of the Portland-Tacoma line, namely on September 22, 1882.*

*Of the 213,001.66 acres 16,240 acres are also located in and withdrawn from common limits of the first indemnity belt of the 1864 grant. Defendants were awarded compensation for these 16,240 acres by other provisions of the decree. This leaves 196,761.66 acres in second indemnity belt of Washington which is the subject matter of this appeal.

It is admitted that if the Overlap was a loss to the grant of 1870 for which the company is entitled to indemnity, that grant, in Washington, was deficient on September 22, 1882 in the amount of 598,874.30 acres, and second indemnity limits in that state were authorized by the Joint Resolution and were properly laid down. Therefore, the withdrawals are invalid under the *Forest Reserve Case* the same as the withdrawals involved in No. 476. Otherwise, there was a surplus in Washington on September 22, 1882 of 38,706.69 acres, second indemnity limits were not authorized, and the withdrawals are valid. Finding III (h) (R. 616).

The District Court, affirming the Master, decided that the Overlap area was not a loss to the grant of 1870 for which indemnity is due. By the ninth paragraph of the decree (R. 644) it is adjudged that the lands withdrawn from second indemnity limits of Washington, described in Schedule K attached to the decree, be retained by the United States without payment of compensation to defendants.

The facts are fully stated in Finding III (R. 616).

In aid of the railroad authorized by Section 1, Section 3 of the Act of July 2, 1864 makes a grant of public lands and provides indemnity for lands disposed of at date of definite location as follows:

> "3. That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every

alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; *and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road and within

fifty miles thereof, may be selected as above provided: *And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." (Italics supplied)

The Joint Resolution of May 31, 1870, authorized the company to mortgage its railroad; authorized construction of an additional line from a point at or near Portland to Puget Sound; and provided for a second indemnity belt ten miles wide, immediately adjacent to the first belt. The portion now material is as follows:

"and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the Valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, *at the time of the final location thereof,* the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the

passage of the act of July two, eighteen hundred and sixty-four." (Italics supplied)

That portion of the Cascade Branch co-terminous to the lands in question was definitely located in 1884. The entire railroad was completed and accepted by the President as provided by Section 4 of the Act of July 2, 1864. That portion of the line authorized by the Joint Resolution from Kalama to Tacoma, co-terminous to the lands in question, was definitely located May 14, 1874 and completed May 12, 1874. Construction of the entire line from Portland to Tacoma on Puget Sound was completed August 22, 1883. *The date of last definite location of the Portland-Tacoma line was September 22, 1882.* Upon demand of the company a second indemnity belt was laid down on both sides of the line in both Oregon and Washington by the Secretary of the Interior, and diagrams thereof filed with the local land offices on November 10, 1906, as provided by the Joint Resolution. Finding III, (i) (R. 617).

Both railroads were operated by the Northern Pacific Railroad Company until 1896 when the property passed by foreclosure of mortgages issued under authority of the Joint Resolution, to the Northern Pacific Railway Company. That company assumed and has discharged all the charter obligations of the Railroad Company. It has carried government freight and personnel at rates prescribed by Congress for which deductions from commercial rates have amounted to $2,381,697.27 during the Railroad Company's operation and $15,938,750.88 during the Railway Company's operation to December 31, 1931. Deductions have been accruing at the rate of approximately $500,000 per year ever since (R. 721). It is undisputed that the

United States has received and is still receiving in full the consideration for the grant. As this court said in the *Forest Reserve Case* in 1921:

> "A third of a century already has elapsed since the company earned the right to receive what was intended by the grant." 256 U. S. 51, 67.

Explanatory Statement.

It is important that the precise bearing of the Overlap point on the withdrawals be understood. The Master, apparently, had moments of forgetfulness. It was in such a moment that he volunteered the comment (R. 518), that the company had never offered to use the Overlap area as base for selection of indemnity lands, from which he drew the inference that the company had not heretofore regarded the Overlap as a loss for which it was entitled to indemnity. The Master did not make this a ground of decision. As far as the company's attitude toward the Overlap area is concerned, it was shown that it has always taken the same position that it is now taking. It offered such proof, but, upon objection by the Government that the company's attitude toward the Overlap was immaterial, this evidence was excluded. (Statement of evidence, R. 793). It is our understanding that the Government does not now make any argument or take any position with respect to these remarks of the Master. However, that misunderstanding may not recur in this court we wish to state the precise bearing of the Overlap point on the withdrawals.

The Joint Resolution provides for a second ten mile indemnity belt on each side of the road in the event there

be not within the charter limits in Washington, (place and first indemnity), *at date of last definite location* of the line, the amount of lands granted; that is to say, forty sections per mile of lands not previously disposed of by the Government. In that case a second indemnity belt is authorized, wherein the deficiency may be made good "to the amount of the lands that have been granted * * * or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four". The withdrawn lands are within this second belt in Washington. The company could not, of course, select those lands unless it was entitled to have a second belt laid down; that is, unless there were not sufficient lands within the charter limits, namely place and first indemnity, at date of last definite location, in which event a second belt of ten miles is provided for. If the Overlap area was a loss to the 1870 grant for which the company is entitled to indemnity, there was a deficiency of 598,874.30 acres in Washington on September 22, 1882, the date of last definite location, as shown above; the second indemnity belt was authorized; was properly laid down by the Secretary in 1906; and the withdrawal was invalid. If the Overlap was not a loss to the grant of 1870 for which indemnity is due, there was an excess of 38,706.69 acres; second indemnity limits were improperly laid down; and the withdrawal is valid. We cannot, of course, select any of the Overlap lands as they have already been received under the 1864 grant; nor do we wish to use the Overlap lands themselves as base for selection of the withdrawn lands because the company has always had and still has a superabundance of other losses with which to select every acre of the withdrawn lands.

That the Master forgot the precise bearing of the Overlap was the occasion for his inappropriate comment that the company did not, and does not now, tender the Overlap area as base for selection of indemnity lands either in first or second limits. That the Company has now and always has had a superabundance of other losses is not disputed. The entire 1870 grant has been greatly deficient from its date; that is, the company has always had far more losses than it could satisfy. See Finding III (k), (R. 618). It there appears that the deficiency on December 31, 1897, counting only surveyed lands, was 1,195,989.49 acres and gradually increased to 1,229,170.17 acres on December 31, 1906. (It was in 1906 that a second indemnity belt was laid down.) If unsurveyed lands be included, the deficiency ranged from 766,055.46 acres on December 31, 1897, to 1,228,044.45 acres on December 31, 1906. Finding III (k) concludes as follows:

> "The area of the Tacoma Overlap is 637,580.99 acres. There was a deficiency on each of the dates above shown whether or not said Overlap area be counted as a loss."

So, the only importance of the Overlap is to establish a deficiency in the grant in Washington on September 22, 1882, the date of last definite location mentioned by the Joint Resolution. To repeat, we do not now wish, never have wished, and never needed to use the Overlap lands *as a base* for selection of withdrawn lands, or any other lands. The company always had and still has a superabundance of other proper losses. We submit this statement in the hope that the precise bearing of the Overlap point will be clear to the court.

ASSIGNMENT OF ERRORS.

Appellants assign the following errors in the record and proceedings in this cause:

1. The District Court for the Eastern District of Washington, Northern Division, erred in adjudging by paragraph IX of the decree that the withdrawals of 213,001.66 acres from second indemnity limits of the grant of May 31, 1870, in the state of Washington, described in Schedule K attached to the decree, were valid and that said lands should be retained by the United States without payment of compensation to defendants or any of them (R. 644, 660).

2. The District Court erred in concluding that the Northern Pacific Railroad Company and its successor, Northern Pacific Railway Company, were not entitled to indemnity under the grant of 1870 for the loss of 637,580.99 acres of odd-numbered sections within the place limits of the grant of July 2, 1864, and earned and received by said Northern Pacific Railroad Company under the Act of July 2, 1864. Conclusion (b) of Finding III (R. 620, 660).

3. The District Court erred in Conclusion (b) to Finding III (R. 620), that the grant by the Joint Resolution of May 31, 1870, in Washington was not deficient on September 22, 1882, the date of final location of the line authorized by said Joint Resolution; that second indemnity limits in Washington, therefore, were not authorized; and that the withdrawals of 213 001.66 acres from said second indemnity limits of Washington (except 16,240 acres claimed as being also within the first indemnity limits of the grant of July 2, 1864) were and are valid (R. 661).

4. The District Court erred in overruling appellants' Exception II to the report of the Special Master filed with the Clerk July 26, 1937 (Exc. II, R. 539; Order, par. (23), R. 579, 661).

ARGUMENT.

1. *The District Court violated a fundamental rule of statutory construction in holding that the indemnity right given by the Joint Resolution should be construed "as though the resolution in this respect, had been a part of the grant of Section 3 of the act of 1864" creating the Railroad Company.*

Said Section 3 grants every alternate odd section of public lands and provides for selection of lieu lands as indemnity for lands which "shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of" prior to "the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office." The Joint Resolution authorizes construction by the company of an additional line *"under the provisions and with the privileges, grants, and duties provided for in its act of incorporation"*. The District Court, following the Special Master, held that the Joint Resolution of 1870 should be construed, in respect of indemnity rights granted, as if it had been a part of the act of incorporation of 1864. To repeat the Master's language:

> "It is as though the resolution in this respect had been a part of the grant of Section 3 of the act of 1864.
> * * *

"By the act of 1864 indemnity was provided

'whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of * * *'.

"The term 'shall have been granted' obviously means granted to somebody other than the Northern Pacific. So the term 'or otherwise disposed of' refers to a disposition to some person other than the Northern Pacific. There was no Northern Pacific until the act making the grant created it. Therefore it cannot be disputed that the phrase means what I have just said." (R. 515)

So, reading the Joint Resolution of 1870 as a part of the 1864 grant, it was the Master's view that the Overlap area could not be a loss for which indemnity is provided by the 1870 grant because the words "shall have been granted", and the words "or otherwise disposed of", cannot include a loss of lands granted or disposed of by the United States to the Northern Pacific Railroad Company for the reason that no such railroad was in existence prior to the act of incorporation. Instead of reading the Joint Resolution into the Act of 1864, the court should have read the 1864 Act into the Joint Resolution. It is an established canon of statutory construction that where one statute adopts the provisions of another statute, *the legal effect is the same as though the adopted words had been incorporated into the adopting statute.* This rule is quoted from Sutherland on Statutory Construction, 2nd Edition, Vol. 2, p. 787, by this court in *Hassett v. Welch,* 303 U. S. 303, as follows:

"Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same

as though the statute or provisions adopted had been incorporated bodily into the adopting statute." (p. 314).

The adopted provision of the 1864 grant gives indemnity for lands which "shall have been granted * * * or otherwise disposed of". This language is "incorporated bodily" into the resolution by the words, "under the provisions and with the privileges, *grants* and duties provided for in its Act of incorporation". Therefore, it inevitably follows that the words, "shall have been granted * * * or otherwise disposed of", describe literally the Overlap area. That land had been "granted" and "disposed of" by the Act of 1864. Reading the indemnity clause of the 1864 grant into the 1870 grant the overlap lands are literally sections which "have been granted * * * or otherwise disposed of." There is no room for construction. They were granted and disposed of by the 1864 Act. For this prior disposition the 1870 grant gives indemnity.

2. *The District Court gave to the language adopted by the Joint Resolution of 1870 only the legal effect attributed to the Act of 1864. But it is well settled that the legal effect of the adopted language is derived wholly from the Joint Resolution, not at all from the Act of 1864.*

Thus, in *Interstate Railway Co. v. Commonwealth of Mass.*, 207 U. S. 79, the company's charter made it "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies". The railway company alleged that a certain general law requiring transportation of

pupils at one-half fare was unconstitutional. The court held that the company could not raise the point because it was bound to observe the statute to the same extent as if its provisions had been inserted in its charter. The court said:

> "If the charter, instead of writing out the requirements of Rev. L. 112, Sec. 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, *it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter.* The document, therefore, might as well be an unconstitutional as a constitutional law. See *Commonwealth v. Melville,* 160 Massachusetts, 307, 308. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear." (pp. 84, 85). (Italics supplied.)

So with the Joint Resolution. In authorizing the construction of the new line "with the *privileges, grants* and duties provided for in its act of incorporation", it granted 40 sections per mile and the same right of indemnity as if the indemnity clause of the Act of 1864 had been repeated in the 1870 grant. And if so repeated, the right would be derived solely from the provisions of the Joint Resolution. The Act of 1864, from which the language was adopted, gives no vitality to the grant or indemnity provided by the Joint Resolution of 1870. Considered as the source from which certain words were adopted, the Overlap might just as well have been granted to a *different company* by the Act of 1864. In that case it is admitted by the Master

(R. 508) that indemnity would be due the Northern Pacific under the 1870 grant. See *Northern Pacific R. v. Musser-Sauntry*, 168 U. S. 604; and *United States v. O. & C.*, 176 U. S. 28.

In *Panama R. R. Co. v. Johnson*, 264 U. S. 375, the constitutionality of Section 20 of the Merchant Marine Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920, was in question. The act provides for an action at law for damages for personal injuries to or death of a seaman in the course of his employment, and, "in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply". The last quoted provision was attacked as in conflict with Section 2 of Article III of the constitution, for the reason that it enabled a seaman asserting a maritime cause to withdraw it from the maritime law and admiralty jurisdiction and have it determined according to the principles of a different system applicable in a distinct and irrelevant field. The court held against this contention on the ground that the statute neither withdraws injuries to seamen from the operation of the maritime law nor enables the seaman to do so. The court said:

> "On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system.
>
> "The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. *In that field their strength and*

*operation come altogether from their inclusion in the maritime law * * * True, they are not in so many words made part of that law; but an express declaration is not essential to make them such."* (pp. 388, 389. Italics supplied.)

Obviously the court below decided directly contrary to this well settled rule. The Master did not really construe the indemnity clause: he did not hold that the words, "shall have been granted * * * or otherwise disposed of", do not mean prior grants or dispositions to the *same* company. He only held that the words cannot apply to grants to the Northern Pacific because they are found in the statute which created that company. This *in no way bears upon construction.* Obviously, the Master forgot that the *adopting statute* of 1870 gives vitality to the grant and indemnity clause, not the 1864 statute; that the Northern Pacific had been created six years before; that the indemnity clause, considered as part of the 1870 statute, has literal application to the prior grant and disposition of the Overlap area by the Act of 1864. Had the Master remembered that the 1870 Resolution is the *only source* of the grant and indemnity for losses to that grant he could not have made this obvious mistake. Perhaps it should be said that the United States did not argue for the Master's construction. It relied on totally different arguments and the Master decided against them. Even in the District Court counsel for the Government did not support the Master's view. They adhered to their position before the Master. The District Court also decided against those arguments and followed the Master.

3. *The District Court, following the Master, decided directly contrary to United States v. Southern Pacific, 146 U. S. 570, 595.*

In that case there was a main line and later branch line grant in the same words as the Northern Pacific grants. The Southern Pacific contended that the phrase, "with the same grants, rights and privileges", appearing in its later branch line grant made *that* grant take effect as of the *date* of the earlier main line grant. The court said at page 595:

> "It matters not that the act of 1871 in terms purports to bestow the same rights, grants and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. *That merely defines the extent of the grant and the character of the rights and privileges;* it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants, as established by *St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad,* 112 U. S. 720, and *Sioux City & St. Paul Railroad v. Chicago, Milwaukee &c. Railway,* 117 U. S. 406." (Italics supplied.)

The Master, though he quoted the above (R. 515) arrived at an opposite conclusion. The company, having received the entire area under the prior grant and having been denied indemnity to the 1870 grant, is left in exactly the same position as if it had received half the odd sections in the Overlap under each grant. In other words, the company, under the Master's ruling denying indemnity, is left in exactly the same position as if the moiety rule had been

applied to the two grants. This result is diametrically opposite to the ruling in the *Southern Pacific Case*. Furthermore, this result is indefensible for the reason that under no circumstances can the moiety rule apply to grants to the same company, for one cannot be a tenant in common with himself. This last feature was not present in the *Southern Pacific Case* because the grants were to the Atlantic & Pacific and Southern Pacific, a distinct grantee.

We emphasize now that under the main line grant to the Southern Pacific of 1866 and its branch line grant of 1871 an overlap occurred at the junction of the two lines, thus giving rise to the *identical situation* we have here, and that the Government, in administering the Southern Pacific grants, has given indemnity to the later branch line grant for the Overlap area received by the Southern Pacific under its prior main line grant. In so adjusting the grants the Government correctly applied the rule of the *Southern Pacific Case*. The Southern Pacific adjustment is discussed, *post* p. 43 *et seq.*, and we ask that what is there said be read in this connection. We are only asking the same adjustment which the Government gave to the Southern Pacific under identical circumstances.

The point made by the Master, that the Joint Resolution does not incorporate the *language* of the indemnity clause, but incorporates only the *legal effect* of that language, eludes comprehension. He said (R. 516):

> "I repeat, the resolution did not adopt the language of the act. It adopted the result, the legal effect of that language."

The Master cannot mean that the Joint Resolution confers the right to indemnity for only those losses in the 1864

grant for which indemnity was provided by *that* grant; for he recognizes that the Joint Resolution did make a new *grant and a new indemnity privilege therefor.* That this is so has long been settled by this court. See *United States v. Northern Pacific,* 152 U. S. 284.

That the Master rested his decision upon the difference between adoption of "the language of the act" and "the legal effect of that language" is a curious solecism. Certainly it is true to say that "the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear", for the quotation is from the opinion of this court in *Interstate Ry. Co. v. Commonwealth, supra.* It is fair to infer that had the Master not supposed that there is such a difference he would have held for appellant: he would have applied the canon that the legal effect of adopted words is derived from the adopting statute. Plainly, the Master mistook the reason why the Northern Pacific cannot have indemnity under the 1864 Act for lands earned under *that Act.* The reason is not that the lands have been received *by the Northern Pacific.* The reason is that they were received *under the very act* which provides for indemnity. The indemnity provision of both the Act and Resolution is for lands "in lieu" of those granted; and so, of course, cannot be exercised where the grant has been fulfilled. This is just as obviously true as applied to the 1870 grant as to the grant of 1864.

4. *In construing the provisions of the indemnity clause as excepting lands granted or otherwise disposed of to the Northern Pacific, the Master violated the invariable rule that where statutes contain no exceptions, the Courts can make none.*

The language of the indemnity clause is as clear and explicit as could be employed. It confers the privilege of selecting indemnity lands whenever, prior to date of definite location, any of the sections or parts of sections Congress purported to grant "shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of". There is not the slightest suggestion in this language that it makes any difference *to whom* the lands shall have been granted or how they were otherwise disposed of, if their condition *was in fact* such that they could not pass. The grant was an offer of certain lands in place limits as consideration for the construction of a railroad, with provision for selection of other lands in lieu of any which had been "otherwise disposed of" at date of definite location. (If previously disposed of to the company itself, they had been *earned* under the Act of 1864.) Hence, it would seem to be enough that the lands could not pass by the 1870 grant, and, therefore, a matter of no moment that the company itself, rather than some other person or company, had theretofore earned and received them.

The exception introduced by the Master is not necessary to effectuate the *legislative intention* in the Act of July 2, 1864. Congress could not have had any intention at all with respect to lands previously granted to the Northern Pacific at the time the *1864 Act* was passed, because there

could not have been *any such lands*. The occasion for the expression of an intent to make an exception of lands previously granted to the company itself, if any such intent existed, first arose when the grant was made for the Portland-Tacoma line by the Joint Resolution of May 31, 1870. Congress *then made no exception* to the generality of the indemnity provision, but provided simply that in respect of the new line the company should have the privileges and grants provided for in its act of incorporation. The rule of statutory construction applicable in this situation is stated as follows in 25 Ruling Case Law, Section 224, page 972:

> "224. Introduction of Exceptions by Construction—As a general rule, where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. And it is an invariable rule that an exception cannot be created by construction where none is necessary to effectuate the legislative intention. The power to create exceptions by construction can never be exercised where the words of the statute are free from ambiguity and its purpose plain. It is only where the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts may recognize exceptions. The courts have no dispensing power over statutes. Where statutes contain no exceptions, and it cannot be said with certainty that exceptions were contemplated by the legislature, the courts can recognize none."

This rule has been repeatedly recognized and applied by this court. A case directly in point is *Farrington v. Ten-*

nessee, 95 U. S. 679. There the charter of a bank granted by the legislature of Tennessee provided that "the said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." Thereafter an act of the Legislature was passed providing for the taxation of shares of stock in any bank, institution or company as property in the hands of shareholders. The question was whether the charter of the bank exempted shareholders from taxation of their shares. The claim of the State was that the phrase in the charter "which shall be in lieu of all other taxes" meant in lieu of all other taxes *upon the bank.* The court said (p. 689):

> "We cannot so hold without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent. Our view is fully sustained by the leading authorities upon the subject."

In *Galloway v. Finley,* 12 Pet. 264, the question was whether the patent to certain land obtained by Galloway was invalidated by an act of Congress which provided "that no locations as aforesaid within the above mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for lands located contrary

to the provisions of this section shall be considered null and void." It appeared that prior to the location made by Galloway a patent to the land in question had been issued to one Charles Bradford under whom Finley claimed, but that the patent so issued was void because issued after Charles Bradford's death. Galloway claimed that the purpose of the statute was the protection of defective but valid surveys and patents and that an exception of void patents should be read into the language of the statute. The Court said (p. 299):

> "The statute is general, including, by name, all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require, that the courts should not introduce an exception, the legislature having made none."

In *French v. Spencer,* 21 How. 228, the Court said (p. 238):

> "The act of March 5, 1816, has no reference to, or necessary connection with, any other bountyland act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is that, where the Legislature makes a plain provision without making any exception, the courts can make none."

In *Maxwell et al. v. Moore et al.,* 22 How. 185, where a similar question was involved, the court said (p. 191):

> "We can only here say, as we did in the case of French v. Spencer, (21 How. 238) that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the Legislature makes a plain provision, without making any exception, the

courts of justice can make none, as it would be legislating to do so."

In *The Cherokee Tobacco,* 11 Wall. 616, the question was whether the Internal Revenue Act of 1868 was in force in the Indian territory embraced within the western district of Arkansas and occupied by the Cherokee nation of Indians. The treaty of 1868 between the United States and the Cherokee nation provided that every person residing in the Cherokee nation should have the right to sell any products of his farm or any merchandise or manufactured products without restraint, paying any tax thereon levied by the United States on the quantity sold outside of the Indian territory. The 107th section of the Internal Revenue Act specifically provided that it should be construed to extend to the articles therein taxed "produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not". The Court said (p. 620):

"The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it."

5. *Not only has the District Court, following the Master, done violence to the rule against interpolating exceptions, but has also violated the maxim, "expressio unius" etc.*

The maxim clearly applies here because, by the first proviso of Section 3 of the Act of 1864, it is expressly provided that "if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be *deducted* from the amount granted by this act." The proviso makes the only exception to the right to receive indemnity for lands previously granted. See *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 68. The Joint Resolution authorizes the construction of a new line "with the privileges, grants, and duties provided for in its act of incorporation". As the first proviso of Section 3 above quoted is an express limitation upon the grant and the indemnity privilege, it follows that it applies to the new line no less than to the charter line: that is to say, the proviso denies indemnity to the new line to the same extent as to the charter line. Now, the court, by its construction of the Joint Resolution, has implied and interpolated a *further* exception; namely, that the company is not entitled to indemnity under the 1870 grant for lands earned and received under the 1864 grant and has *"deducted"* the overlapping area from the measure of the grant by the 1870 resolution. The court has done this notwithstanding it is admitted that the two routes are not "upon the same general line". The fact that Congress inserted this proviso

proves that otherwise the company would have been entitled to indemnity even where its route was on the same general line as that of a prior railroad grantee. It proves that, but for this express provision, the broad language of the indemnity clause would admit of *no* exception. It is an established canon that an exception in a statute is an affirmation of its application to all other cases. *Bend v. Hoyt,* 13 Pet. 263, 272; 25 R. C. L. 983; 59 C. J. 984, 1092, note 75; Sutherland on Statutory Construction (2nd ed.), Sec. 494. This canon is embodied in the maxim, *expressio unius est exclusio alterius.*

6. *The court, in effect, treated the two grants as if they were a single grant.*

It is plain that the denial of indemnity for the Overlap lands rests solely on the consideration that the company did in fact get title thereto. The right to indemnity, however, depends only on a loss *from the grant which provides the indemnity,* not on whether or not the company did in fact *otherwise* acquire title to the land. If, for example, the company had purchased from a homestead settler, prior to date of definite location of its line, a section of land lost to its grant because occupied by such settler, it could hardly be pretended that its right to indemnity for that land would be lost because it had in fact otherwise acquired it. And, if *the mere fact of acquisition* would not bar the right to indemnity, it is difficult to see why it should make any difference that the land was acquired from the Government itself, so long as it was not acquired *by virtue of the grant which provides the indemnity.* Hence, the holding of the Master necessarily amounts to a holding

that the grant of lands for the Portland-Tacoma line and the grant of lands for the Cascade branch were one and the same grant. That they were *not* one and the same grant, and cannot be treated as one for any purpose, is so well settled as to be beyond dispute. *United States v. Northern Pacific R. Co.*, 152 U. S. 284; *Northern Pacific R. v. DeLacey*, 174 U. S. 622; *United States v. Northern Pacific R. Co.*, 193 U. S. 1. The Master recognized that this is so (R. 511). The administration of the two grants has been separate. 25 L. D. 511. It is impossible to hold in the face of these decisions that the grant of 1870 was so much a part of the grant of 1864, that the former could not *purport* to grant lands earned by the latter. In 193 U. S. 1, *supra*, this court held that the Northern Pacific Company was entitled to receive, under the 1870 grant, lands within the conflicting place limits of the unconstructed line down the Columbia River to Portland, authorized by the 1864 act. *Had the Cascade line not been located the case cited is conclusive that the Overlap lands would have been received by the 1870 grant. Therefore, the Overlap lands were such as the 1870 Resolution purports to grant.* For loss of lands which Congress "purports to grant" indemnity is due.

7. *The Court erred in giving no effect to the indemnity provisions of the 1870 grant.*

The court has overlooked the bearing of the Joint Resolution itself. The obvious and admitted purpose of the second indemnity belt was to secure to the company the full measure of *both* grants. It is provided:

> "and in the event of there not being in any State or Territory in which said *main line or branch* may be

> located, at the time of the final location thereof, *the amount of lands per mile* granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled * * * to receive so many sections of land * * * within ten miles on each side of the said road beyond the limits prescribed in said charter, as will make up such deficiency, *on said main line or branch* * * * to the amount of the lands that have been granted * * * or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four." (Italics supplied.)

The meaning of this is obvious. If there be not the amount of lands granted, viz., forty sections per mile, then the company may select enough to make up the deficiency. The only limitation is as provided in the last clause, viz., that the *amount selected* shall not exceed the *amount disposed of* since July 2, 1864. As the Master said of this phrase (R. 428):

> "The language of the Resolution authorizing second indemnity limits uses the term 'subsequent to the passage of the act' only as a measure of the *quantity* of losses that may be satisfied in second indemnity (limits), not as a definition of the *character* of those losses. So long as the selections made in second indemnity (limits) do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity (limits). This seems to me plain."

There is no dispute that defendants' "subsequent" losses in the 1870 grant exceed the 213,000 acres of withdrawn lands in second indemnity limits, for which compensation is claimed. See Finding III (n), R. 619.

No one has yet said, least of all the Master, that the company would not have received a full grant for the 1870 line if the 1864 line had not been definitely located. It is admitted that it would (193 U. S. 1). That admission establishes that the "amount of lands granted by Congress to said company" was forty sections per mile; to secure that amount was the purpose of second limits wherein defendant had the right to select so much land "as will make up such deficiency on said main line or branch". The only limitation on this right is that the selections may not exceed the acreage lost to settlers, etc. since the date of the charter. This limitation we do not ask to exceed.

It was, at one time, urged that Congress did not intend to make any grant in aid of the Tacoma-Portland line. This contention, of course, was untenable in view of the Congressional debates and Joint Resolution of April 10, 1869 which first authorized construction of the Portland to Puget Sound line and provided that the company should have no subsidy in additional lands therefor. But, because the company was unable to finance construction of the additional line, the Joint Resolution of May 31, 1870, provided the same subsidy in lands as was given for construction of the charter line. See *United States v. Northern Pacific,* 152 U. S. 284. There is no reason for suspecting an intent that the later grant should be any less extensive than the 1864 grant. That supposition is inconsistent with the phrase "with the rights, grants, and privileges" as provided for the line from Lake Superior to Puget Sound. See *United States v. Southern Pacific,* 146 U. S. 570, *supra,* p. 20. Nor is there any reason why the 1870 line should not have the same aid as the 1864 line. The company by

the 1864 act was under no obligation to build the 1870 line. The need for aid for that line was not any less than for the charter line. The United States received all of the consideration for its grant in aid of the 1870 line that it received for the grant in aid of the 1864 line. It received the same consideration from construction by this company as it would have received from construction by the O. & C. or a newly created company. The Northern Pacific, if it receive indemnity for the Overlap area, will receive only the stipulated amount of lands per mile *for the number of miles which it constructed.* For example, if the 1864 Act had authorized a line from Lake Superior to Puget Sound and thence to Portland, the company would not have received indemnity for the Overlap, but it would have been entitled to the full forty sections per mile and would have received, instead of indemnity for the Overlap, approximately 400,000 acres of odd sections in the quadrant northwest of Tacoma, including the sites of Seattle and Tacoma, as shown on the sketch, *supra.* On the other hand, if the 1864 act had authorized a line from Lake Superior via Portland to Puget Sound, the company would have been entitled to a similar area southwest of Portland, as shown on the sketch.

In *United States v. Union Pacific,* 148 U. S. 562, two lines were authorized by separate acts making separate grants which the court said were in legal effect the same as if construction of a continuous line from the Missouri River via Denver, thence north to Cheyenne, had been authorized by a single act with a grant therefor. In that situation the court held that Denver was not the terminus of either line, but that there was a through line to Chey-

enne via Denver and that, therefore, the Union Pacific was entitled to lands west and south of Denver. The court said:

> "It is true that, under the original act of 1862, the grant was limited to the odd-numbered sections 'on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road', but it does not follow that if the road makes a curve or right angle, the grant ceases in any way to be operative at that point. The railroad is entitled to its grant of ten alternate sections to each mile of road, and is entitled to have it selected within the limits of twenty miles on each side; but there is no requirement that the lands shall be reached by a line run at right angles to the road." (p. 569)

It was in fact contended at an early date that the Northern Pacific grants do authorize a single line, as in the case supposed. But it was settled in *Northern Pacific v. DeLacey*, 174 U. S. 622, that the Cascade line from the east was constructed under the Act of 1864. By *United States* v. *Northern Pacific*, 152 U. S. 284; *United States* v. *O. & C.*, 176 U. S. 28; and *United States* v. *Northern Pacific*, 193 U. S. 1, it was decided that the Tacoma-Portland line was constructed under the Joint Resolution. In this view, and it is certainly correct, the company could not receive the odd-sections in the quadrant northwest of Tacoma. But the company was entitled to receive the Overlap area and would have received it, had it not been granted and fully earned under the 1864 act. For that loss the 1870 grant is entitled to indemnity. It is plain, therefore, that the company is not seeking unmerited advantage or urging a technical and unreasonable construction of its grant. It is asking only for the measure of the grant as defined by

this court in 256 U. S. 51 for the *actual number of miles of railroad it has constructed;* and, even if it receive compensation for the 213,000 acres of withdrawn lands, the 1870 grant will still be deficient by approximately 850,143 acres. Finding II (i), Validity or Invalidity of Withdrawals, Grant of 1870, (R 615).

8. *The Overlap lands were such as Congress "purported to grant" and which would have passed to the company under the Joint Resolution of 1870 but for their prior disposition to the Northern Pacific under the 1864 grant. Therefore, indemnity is due to the company under the 1870 grant.*

The Government argued below that, because the lands within the Overlap were previously granted to the Northern Pacific by the Act of 1864, they were not also granted by the Joint Resolution; that Congress will not be presumed to have twice granted the same lands. Of course, there is no question of the correctness of this proposition. But that it prevents indemnity is a very different question. On the contrary, the company claims indemnity *for the very reason* that the lands had been previously granted. The Government's argument would be just as effectual to deny indemnity for lands previously granted or disposed of to pre-emptioners, to another railroad, or in any other manner mentioned in the Act of 1864. The Master, followed by the District Court, seems to have been misled or confused by the Government's argument, for he said (R. 516):

> "The United States said to the Northern Pacific, 'If you will build this line, we will grant you this land; we will give you indemnity for losses along the line to third persons; but likewise, if by the location of your line across the Cascades you already get it, we will not give you indemnity because you did not get it a second time.'"

This language shows the Master completely mistook the point. It is not a case of getting the land *again, of a double grant to the 1864 line.* It is a case of indemnity to a *new* line under a *later* grant. The two acts created separate and distinct obligations and made separate and distinct grants. In each act the respective obligations and rights are independent of the other. Neither the company nor the Government incurred any obligations or acquired any rights under one grant by reason of anything done or omitted under the other. There is no dispute as to that.

But, to come back to the Government's argument. Obviously, counsel is misled by the meaning he attributes to the word "granted". Section 3 reads: "That there be, and hereby is, *granted* to the Northern Pacific Railroad Company". As the phrase contemplates a *present* grant, the Government argues that Congress could not have intended to grant again what it had already granted. But the word "granted" means what Congress *purported to grant and the company would have received* but for prior disposition, in which event indemnity is provided. This meaning is made clear by the *Barney Case,* 113 U. S. 618. There were conflicting grants, and the same argument was made there as here. Obviously, said the court, it was impossible to know the specific route in advance of survey and in many in-

stances sales of land had already been made. It was not for the interest of the country that any portion of the public lands should be withheld from settlement awaiting definite location of the railroad; nor was it the purpose of Congress to lessen the extent of its aid because it might be found that at the time of definite location portions of the lands along the route had been previously disposed of. In that event, said the court, other lands might be selected. The court then answers the argument relied on here by the Government, and said:

> "As already said, the whole act must be read to reach the intention of the law-maker. It uses, indeed, words of grant, words which *purport to convey what the grantor owns,* and, of course, cannot operate upon lands with which the grantor had parted; and, therefore, when it afterwards provides for *indemnity* for lost portions of the lands 'granted as aforesaid', it means of the lands *purporting to be covered by those* terms. Nor is it to any purpose to cite decisions to the effect that the grant is *in praesenti,* passing an immediate interest to the State. Such is undoubtedly the case, except as the operation of the grant is affected by the limitations mentioned; that is to say, when the sections granted are ascertained, the title to them takes effect as of the date of the grant, and cuts off all intervening claimants except as to such portions as may have been sold, or to which preemption rights might have attached." (p. 626. Italics supplied)

The Overlap lands, but for prior disposition under the Act of 1864, would have been received under the 1870 grant. 193 U. S. 1, *supra.* Therefore, they are lands which Congress *"purported to grant",* within the meaning of the

language quoted from the *Barney Case*. And for loss of those lands indemnity is given, as held in that case.

9. *The decisions of this court and administrative construction of the Northern Pacific and like grants unmistakably point to the conclusion that appellants are entitled to indemnity for the Overlap lands.*

In *Northern Pacific R. Co.* v. *McRae*, 6 L. D. 400, Secretary Lamar reversed the Land Commissioner's ruling and held that the Joint Resolution of 1870 authorized a railroad from Portland to Puget Sound "with the privileges, grants and duties provided for in its act of incorporation". He said:

> "I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line *via* the valley of the Columbia river through Portland to Puget Sound. This conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Congress upon said resolution while it was pending and make clear the manifest purpose of said resolution.
>
> "In the course of the debates Senator Howard said:
>
> 'It asks no more at the hands of Congress, as I said before, than what is promised to them in their original charter of 1864—not a single acre, I repeat, with the exception of the new donations upon the line from Portland to Puget Sound, which is authorized by this resolution. That line from Portland to Puget Sound was not embraced in the original charter. It was authorized and the right of way given to this com-

pany at the last session of Congress (Joint Resolution of April 10, 1869), but simply the right of way and no lands to enable the company to build it. On that line, and on that alone, are lands required additional to those contemplated in the original charter. Cong. Globe, 41 Congress, 2 Sess., page 2546.'

"As reported from the Committee, the resolution contained this language: 'Under the provisions and with the privileges and duties provided for in its act of incorporation and amendments thereto' (page 1584).

"During the debate in the Senate Mr. Howard said: 'I now move to strike out in the fifteenth line the words "and the amendments thereto", so as to make it sure that this new line, which is to pass from Portland to Puget Sound, will be entitled to the subsidy in lands; otherwise it might leave it very uncertain.' The amendment was agreed to (page 2583). Subsequently Senator Howard moved to amend the sentence, 'under the provisions and with the privileges and duties provided for in its act of incorporation', by inserting after the word 'privileges', the word 'grants', saying 'so as to remove any ambiguity that might arise.'

"In the House—in reply to the question, How much additional land will be granted should this bill become a law?—Mr. Wheeler said:

'That depends upon the fact whether the lines will be longer than the original ones. This can only be determined by actual survey. If more land is taken it will be only for the additional distance *and for the quantity per mile granted by the charter.*' (page 3263)

"Mr. Wilson said:

'This is no increase of land over that which has already been given to this road. It only gives them additional land for an additional piece of road, which they now propose to construct from Portland up to

> Puget Sound. The old grant is not increased one acre.' (Page 3266)
>
> "I am clearly of the opinion that the Northern Pacific Railroad Company has a grant of lands from Portland to Puget Sound (Tacoma), and your decision is therefore reversed." (pp. 401, 402).

The above language was quoted with approval by this court in *United States* v. *Northern Pacific R. Co.*, 152 U. S. 284, deciding that the Portland-Tacoma line was authorized by the Resolution of 1870, not by the Act of 1864. The court said:

> "We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound with a right to obtain lands in aid thereof as provided in the Act of 1864. On the contrary it should be regarded as giving a subsidy of lands in aid of the construction of a *new* road not before contemplated that would directly connect Portland and its vicinity with Puget Sound." (p. 294)

The grant, of course, was of the full forty sections per mile in the territories. That was the measure of the 1864 grant and the 1870 resolution bestows the same "rights, grants and privileges". *United States* v. *Southern Pacific R. Co.*, 146 U. S. 570, quoted *supra*, p. 20.

If the company had a full grant, with the single exception mentioned in the first proviso of the third section, namely where there was a conflict between a prior grant to another railroad on the same general line (*Forest Reserve Case*), it must follow that there is the same right

of indemnity. As said by this court in the *Forest Reserve Case*:

> "The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place. *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228." (p. 64)

In *United States* v. *O. & C. R. Co.*, 176 U. S. 28, the question was whether the grant for that part of the line of the Northern Pacific from Wallula to Portland was a claim against the lands which would prevent their passing to the Oregon & California under a subsequent grant. It was held that, as the Northern Pacific had neither definitely located nor constructed that portion of its line, the lands passed to the Oregon & California. At page 50 the court said:

> "Touching the joint resolution of May 31, 1870, it is clear that whatever may be its scope, no previously vested right of the Oregon Company was affected or was intended to be affected by that resolution. On the contrary, the resolution on its face indicates that some of the lands which the Northern Pacific Railroad Company may have been entitled to earn had been or might have been granted or otherwise disposed of 'subsequent to the passage of the act of July 2, 1864,' *and in lieu thereof that company was authorized under the direction of the Secretary of the Interior to receive other lands. The only effect therefore of the joint resolution, as between the Northern Pacific Railroad Company and the Oregon Company, was to confer upon the former company the right to receive other lands in lieu of those appropriated by the latter company under the authority of the act of 1866.*" (Italics supplied)

United States v. *Northern Pacific,* 193 U. S. 1, known as the *Portland Overlap Case,* decided that the Northern Pacific was entitled to receive, under the Joint Resolution, lands within the place limits of the unlocated portion of the line from Wallula to Portland. The court had held, as just shown, that the Oregon and California was entitled to certain of these lands where its grant conflicted with the unlocated line from Wallula to Portland. The question in the *Portland Overlap Case* was exactly the same as in the *O. & C. Case* except that by the Joint Resolution of 1870 the grant was to the same company, namely the Northern Pacific, whereas in the *O. & C. Case* the conflicting grants were to different companies. The Circuit Court of Appeals said that the case was controlled by *United States* v. *O. & C., supra,* unless the fact that in the instant case the two grants were to the same grantee, served to distinguish it. This court said:

> "We do not think the fact that the Northern Pacific was the grantee *in both grants* limits the force of this decision. The resolution of 1870 and the act of July 2, 1864, were *in pari materia, and no reason is perceived for holding that the act operated to exclude from the subsequent grant by the resolution."* (p. 9) (Italics supplied).

This decision, of course, is in line with the decision of Secretary Lamar. The *Portland Overlap Case, supra,* seems controlling in principle. If, as there held, the rights of the Northern Pacific, under the Joint Resolution, are the same in place limits of the unconstructed line as those of the O. & C., a *different* grantee, it must follow that the right of the Northern Pacific to *indemnity* is the same as the O. & C. As it has been decided, and is ad-

mitted, that, had the 1870 grant been to the O. & C., that company would have been titled to indemnity for the Overlap, so also must the Northern Pacific be so entitled.

Since the decision in the *McRae Case,* approved by this court in *United States* v. *Northern Pacific,* 152 U. S. 284, the Land Department has never questioned appellant's right to a second indemnity belt for the 1870 grant. The record shows that second indemnity belts were laid down on both sides of the grant in Oregon and Washington in 1906 and lands were selected and patented in second indemnity limits of both states. It has not been contended to this date that said selections were invalid or that the lands were erroneously patented. (Evidence, R. 796, 797). Only on the assumption that the company was entitled to indemnity for the Overlap could this have been done. Were there room for doubt, this administrative construction of the Joint Resolution would be decisive. *Hewitt* v. *Schultz,* 180 U. S. 139, 156; *Cramer* v. *United States,* 261 U. S. 219, 227; *Kindred* v. *Union Pacific R. R. Co.,* 225 U. S. 582, 596; *Southern Pacific v. United States,* 307 U. S. 393.

If it were possible to doubt the Government's position before this controversy arose, the Southern Pacific adjustment would dispel it. Of course, after the controversy arose neither party could, to better its own position, establish a construction. *New Brantner* v. *Kramer,* 141 Pac. 498; *Long Bell* v. *Stump,* 86 Fed. 574 (CCA 8); *Hull* v. *Westerfield,* 186 N. W. 992.

On July 27, 1866 (14 Stat. 292, Ch. 278) Congress granted lands to the Atlantic & Pacific for a railroad from Missouri to the Pacific Coast. *Section 3 of the Atlantic & Pacific grant, including the indemnity clause, is identical with the Northern Pacific grant of 1864.*

By the 18th section the act made a grant to the Southern Pacific for a railroad to connect with the line of the Atlantic & Pacific at a point near the boundary of California most suitable for a line to San Francisco, and to aid its construction provided that the Southern Pacific "shall have similar grants of land subject to all the conditions and limitations herein provided * * * * * with the Atlantic & Pacific Railroad herein provided for". On March 3, 1871 (16 Stat. 573, Ch. 122) Congress passed an act to incorporate the Texas & Pacific. The 23rd section provided that for the purpose of connecting the Texas & Pacific with San Francisco the Southern Pacific was authorized to construct a railroad from Tehachapa Pass by way of Los Angeles to a connection with the Texas & Pacific, "with the same rights, grants, and privileges and subject to the same limitations, restrictions and conditions as was granted to said Southern Pacific Railway Company of California by the act of July 27, 1866."

An overlap necessarily resulted at the junction of the main and branch lines. The situation, therefore, *presents an adjustment question identical with ours.* The grant of 1871 was finally adjusted by decision of the Commissioner of the General Land Office, approved by the Secretary of the Interior April 15, 1930. It was held that the correct measure of the later grant by the Act of 1871 for the branch line is the aggregate of the odd-numbered sections within the primary limits, *including the entire area of the conflict with the first grant to the Southern Pacific by the Act of 1866.* We are submitting a copy of the letter of April 12, 1930 from the Commissioner to the Secretary of the Interior, and accompanying documents. At the bottom of the letter the Assistant Secretary's approval of the

adjustment is endorsed. The tabulation showing the adjustment, referred to in the letter to the Secretary, shows in detail how the adjustment was made. The measure of the grant is stated at 4,064,373.25 acres. The losses to the grant are shown at 2,327,190.69 acres. Under that the following statement is made: "Due as indemnity for losses other than mineral, 2,317,343.99 acres". On the detailed sheet, copy of which is also submitted, at the top right hand corner under the heading, "Lost to Company Under Its Grant," appears:

Conflicting Grants

Southern Pacific

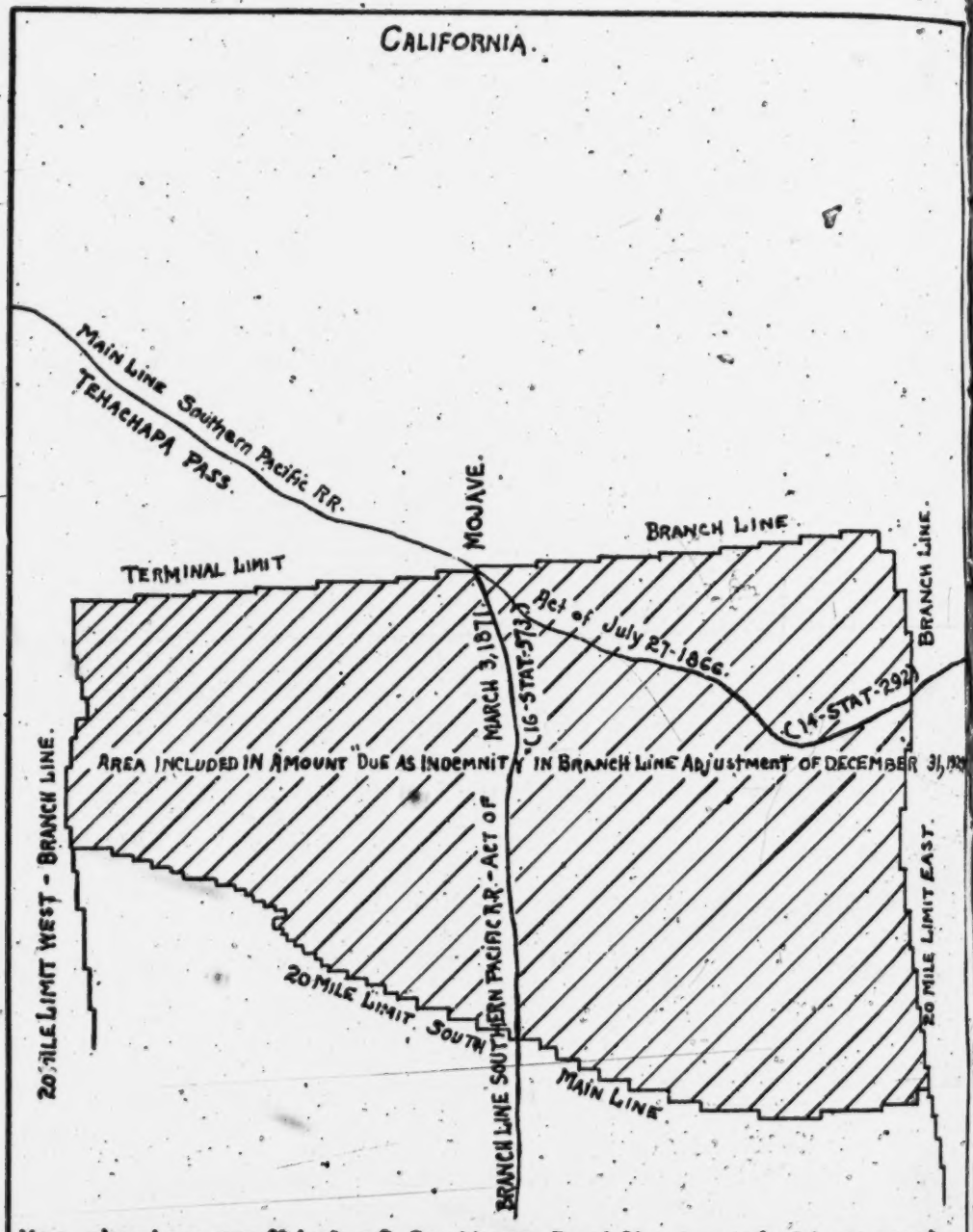
20-M Limits	30-M Limits
267,698.33	20021.34".

These are the conflicting areas of the 1871 grant with the 1866 grant (both made to the Southern Pacific) and are included in the 2,317,343.99 acres of non-mineral losses and for which indemnity is due the later grant, as shown by the adjustment statement submitted by the Land Commissioner to the Secretary. The detailed sheet shows that indemnity is due for this same 2,317,343.99 acres, as follows:

"Lost to Grant—Due as Indemnity—2,327,190.69."

So it is plain that the two Southern Pacific grants were adjusted by the Secretary exactly as defendants contend the two Northern Pacific grants should have been adjusted. We submit a map (p. 46) showing the conflict between the Southern Pacific main and branch lines. This adjustment is considered in 53 L. D., p. 211.

The Southern Pacific adjustment is diametrically opposed to the Government's contention in this case. After this case was started, and on January 16, 1931, the Commissioner of the General Land Office sent out instructions, ap-



Map showing conflict of Southern Pacific branch line grant under the Act of March 3,1871 with the main line grant under the Act of July 27,1866. The main line grant of 1866 earned and received the substantial portion of the hatched area, and the branch line grant of 1871 was awarded indemnity for the entire area.

Words "Due as indemnity" quoted from adjustment statement of December 31,1929.

proved by the Assistant Secretary of the Interior, addressed to the Register of the Local Land Office at Los Angeles, advising that official to accept selections of indemnity lands pursuant to the adjustment, said selections to be made under the rule laid down in the *Forest Reserve Case, of such lands as had been withdrawn by the Government for forest or other purposes after a deficiency in the grant had occurred.*

Defendants had no knowledge of the Southern Pacific adjustment while the case was before the Master. The papers are official documents of which the court will take judicial notice. See opinion of Judge Van Devanter in *Leonard v. Lennox,* (8th CCA) 181 Fed. 760; *Arizona v. California,* 283 U. S. 423; *Caha* v. *United States,* 152 U. S. 211.

If the Southern Pacific adjustment be correct, the deduction of the Overlap area from the measure of the 1870 grant and denial of indemnity therefor is incorrect.

10. *The company's attitude toward the Overlap area as a loss to the 1870 grant.*

The Master (R. 517) made the following statement:

> "There is no proof before me that the company made any objection until the hearings before the Joint Committee of Congress. There is no evidence that at any time before those hearings it put forward any claim to be entitled to have indemnity for the lands within the overlap. * * * Apparently neither the government nor the company ever thought of laying down a second indemnity belt until 1906. There is no proof that the company asked for one and no proof that the government ever considered it."

This observation is not made a ground of decision by the Master, nor the District Court, but it subjects appellant to the imputation of claiming an important right as a mere afterthought.

In the first place, it was *admitted* that second indemnity limits were established in 1906 at the request of the company. We quote from page 207 of the brief of appellee on adjustment before the Master:

> "As a matter of fact, the second indemnity limits were established on the request of the company based upon their statement that such limits were necessary in order that the grant might be satisfied."

The above is quoted verbatim from appellee's Exhibit 69, dated March 5, 1925, letter from William Spry, Commissioner of the General Land Office to the Secretary of the Interior (R. 805). There never was any question that the Railway Company claimed second limits and that they were established at its request in recognition that the Overlap was a loss for which the company was entitled to indemnity.

The Master's comment that Overlap losses were not tendered as base because the company was not claiming this indemnity is wholly unjustified in view of what transpired at the hearing. Appellant's witness, L. L. Schwarm, testified as follows (R. 793):

> "A. The railway company has always had on hand a large amount of losses in the grant of 1870—a great deal larger than an amount of vacant surveyed indemnity lands which we could select.
>
> "The Master: That is, you had more bases than available selections?

"A. We always had a great deal more bases than available indemnity selections."

"Q. There was a statement made yesterday that the Tacoma Overlap was an afterthought—what have you to say about that?

"Judge Biggs: May it please the Court—that I don't think is necessary. Your Honor asked me a question—

"Mr. Frost: I want to get at it in as short a way as possible, and he has been in the Department since 1910.

"Q. Now, tell us what you did about it.

"The Master: You mean about using it—why they did or didn't use the overlap as a base?

"Mr. Frost: He has stated there was always a disproportionate amount of losses on hand—

"The Master: That may be so—do you mean you want him to tell us why they didn't use the overlap?

"Mr. Frost: No, whether the railway company; during the time he has been in this land department; starting with 1910, *didn't always deem the Tacoma Overlap as a loss.*

"Judge Biggs: I object to that. What they may have 'deemed'—

"Mr. Frost: The statement was made yesterday it was purely an afterthought.

"The Master: That was by way of argument—I am not sure but what it was an off the record discussion. Now, Gentlemen, it gets to a perfectly plain proposition—either that the Tacoma Overlap, as a matter of law is a loss, or it isn't. I don't think it makes a bit of difference whether it's a forethought, or afterthought, or a middle thought—what they deemed in the Land Department of the Northern Pacific Railway, or anywhere else—that it is a pure and simple question of law.

"Mr. Frost: I will not press that question."

Appellants could hardly have expected that the Master would suggest that the claim now made was an afterthought after having excluded testimony that the company has always claimed the Overlap as a loss. That this is so is shown by certain documents contained in the transcript, but to which we will not now refer as it may be that appellee will not assert in this court that appellants' contention is an afterthought. Should the contention be made, it will be answered in a reply brief.

Respectfully submitted,

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